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IN THE

Supreme Court of the United States.

OCTOBER TERM 1913.

No. 802.

W. E. JOHNSON, T. E. BRENTS and H. F. COGGESHALL,
Appellants,

vs.

EDWIN GEARLDS, L. J. KRAMMER, FRED E. BRINKMAN ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR APPELLEES.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

INDEX.

Cases Cited.

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BRIEF FOR APPELLEES.

Statement.

This is an appeal from the decree of the Court below, granting the appellees a permanent injunction against the appellants, in accordance with the prayer of their amended bill of complaint (R., 73). The proceedings in the Court below, as shown by the printed transcript of record, consisted of the filing of a bill of complaint in equity by the appellees against the appellants (R., 1-22), to which

appellants interposed a demurrer (R., 22, 23). Appellants' demurrer was overruled and a temporary injunction granted appellees against appellants by an order (R., 24). The lower Court in overruling said demurrer and granting said temporary injunction delivered an oral opinion (R., 24–41). The order for the temporary writ of injunction appears at R. (41, 42). The appellees filed an amended bill of complaint (R., 43–65). The appellants filed a re-amended answer (R., 66–72). It was then stipulated (R., 72) that the cause be submittted to the lower Court upon the amended bill and re-amended answer, and that a decree be entered upon said bill and answer.

Upon said bill and answer the Court entered the decree (R., 73) before referred to and subsequently an appeal to this Court was taken in proper form based upon an assignment of errors (R., 74, 75).

We shall now state as briefly as possible the essential allegations of the amended bill which are admitted by the answer. The answer contains some qualified admissions which we do not deem important, but which are set forth in appellant's brief, pages 6–10. We make the following somewhat full statement for the reason that the one contained in appellants' brief is not detailed enough to do full justice to appellees' case. The complainants are each and every one of them a resident and citizen of the City of Bemidji, Beltrami County, Minnesota, and for a number of years, varying from more than one year in the case of some to fourteen years in the case of one of them, have been continuously engaged at said City of Bemidji in the business of saloon-keeping, and in the selling and disposing at retail of spirituous and vinous liquors, beer, ale and porter, at their respective places of business in said City, and each and every one of them has paid to the Federal and State governments the necessary tax and license fee and has at all times while transacting such business held a receipt from the Federal gov-

ernment and a liquor license issued under authority of the State of Minnesota by the Municipal Council and officials of said City of Bemidji (R., 43–50).

The jurisdictional amount in excess of Two Thousand Dollars, exclusive of interest and costs for each complainant, is shown to be involved.

That neither of the defendants is a citizen of the State of Minnesota, nor a resident thereof, nor has any property therein (R., 57).

That each of the complainants has refrained from selling or disposing of any liquor to Indians, or individuals of Indian blood (R., 50, 51).

That each of the complainants has built up and established a profitable and lucrative trade in his respective place of business in the City of Bemidji; that each of them will be affected by the acts of the defendants, if done as threatened. Then follow full and complete allegations showing jurisdiction in equity.

That prior to the 22nd day of February, 1855, a tribe of Indians known as the Chippewa Indians, comprising the Mississippi, Pillager and Lake Winnebegoshish bands of Chippewa Indians, were in possession of the greater portions of the lands north of parallel 46 within the boundaries of the then territory of Minnesota, and on said date said bands of Indians entered into a treaty with the United States (10 Stat., 1165), by which there was sold and conveyed to the United States all the right, title and interest in and to the lands then owned and claimed by the said bands of Indians in the territory of Minnesota north of the 46th parallel of latitude, excepting that by the second article of said treaty there were set apart to said Indians certain reservations, the boundaries of which are shown on the map hereto appended in red ink and marked 358, 359, 453, 455, 456 and 457, none of which latter included any lands at any time within the municipal limits of the said City of Bemidji, nor any lands adjacent thereto, or

within at least ten miles thereof, and under the terms of said Treaty the United States took over and became the owner and possessor of the lands now within the territorial limits of the said City of Bemidji, and all lands adjoining and contiguous thereto for many miles to the North, West and South, and for at least ten miles to the East of where said City is now located; that among the other provisions of said Treaty there was the following:

> "ARTICLE 7. The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force, within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress" (R., 54).

The boundaries of the territory ceded by said Indians to the United States by said Treaty of 1855 are indicated on the map appended to this brief, in red, and marked on said map with the figures 357.

That after the making of said Treaty of 1855 and on the 7th day of May, 1864, the said three bands of Chippewa Indians and the United States entered into another treaty (13 Stat., 693), which treaty was ratified on the 9th day of February, 1865, and was proclaimed on the 20th day of March, 1865, and under and by the terms of Article 2 of which treaty, in consideration of the cession to the United States by the said Chippewa Indians, of certain reservations provided for by the provisions of said Treaty of 1855, and set apart by that treaty for the Mississippi Band, and other considerations, there was set apart for the future home of the Chippewas of the Mississippi all the lands embraced within boundaries which are described with particularity in the complaint at (see R., p. 58).

That the land so set apart to the said Chippewas of the Mississippi, and of which, by the terms of said Treaty of 1865, they became re-possessed and the sole owners, contained all the territory now within the territorial limits of the City of Bemidji, and of the lands immediately adjacent thereto and distant several miles in all directions therefrom. That the boundaries of the territory ceded by said Indians to the United States by said Treaty of 1865 are indicated on the map appended to this brief, in blue and the tracts themselves are marked 507.

The tracts marked 358 and 359 are the reservations of the Pillager and Lake Winnebigoshish bands excepted from the description.

That on the 19th day of March, 1867, the Chippewas of the Mississippi, being the owners and in possession of the territory last referred to, by virtue of the Treaty of 1865, and the United States, again entered into a treaty (16 Stat., 719) which involved said lands, which treaty was ratified on the 8th day of April, 1867, and proclaimed on the 18th day of April, 1867, and which treaty in its entirety appears on pages 58, 59, 60 and 61 of the printed transcript of record. That by said treaty, among other things, the said Indians receded to the United States tracts 507, viz., the territory embraced in the Treaty of 1865. That the territory ceded to the United States by the Chippewas of the Mississippi by said Treaty of 1867 contained all of the territory within the territorial limits of the City of Bemidji, and for miles in every direction from the limits of said City (R., 58–61).

That the United States has carried out and performed all the obligations assumed by it under the provisions of said Treaty proclaimed on the 20th day of May, 1865, and that under the terms of said Treaty the lands now within the limits of the said City of Bemidji and adjacent thereto became absolutely the lands of the Mississippi band of Chippewa Indians; that said lands, by the provisions of said treaty of 1867, were

ceded to the United States without any restrictions or limitations whatever, and without any provisions relative to the introduction of intoxicating liquors into, or sale thereof, in such territory (R., 61).

That in and by an Act of Congress entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January 14th, 1889 (25 Stat., 642), the President was authorized, by the appointment of three commissioners, to negotiate with the Chippewa Indians in the State of Minnesota for the complete cession and relinquishment of their title to all reservations in the State, except to so much of the White Earth and Red Lake Reservations as, in the judgment of the commissioners, was not required to make the allotments provided for by said Act; and it was further provided by said Act that the acceptance and approval of said cession and relinquishment by the President should operate as a complete extinguishment of the Indian title without any further act or ceremony whatsoever. That pursuant to said Act of January 14th, 1889, the President duly appointed three commissioners to negotiate with said Chippewa Indians for the purposes set forth in said Act, and that at divers times between the 8th day of July, and the 12th day of November, 1889, agreements were entered into between said commissioners on the part of the United States, and the several bands of Chippewa Indians, by which the said Indians accepted and ratified all of the provisions of the said Act of February 14th, 1889, and granted, ceded, relinquished and conveyed to the United States all their right, title and interest in and to all of the Grand Portage, Fond du Lac, Nett Lake, Deer Creek, Leech Lake, Winnebegoshish and Chippewa Reservations, and in a like manner ceded and relinquished and conveyed to the United States all their right, title and interest in and to four townships of the White Earth Reservation and the greater part of the Red Lake Reservation, and that said agreements and cessions were

duly approved by the President on the 4th day of March, 1890 (R., 62).

That Beltrami County, Minnesota, is and ever since 1897 has been a municipal corporation of the State of Minnesota, forming a part of said State, and, as such County, has had within its territory, ever since its organization, the usual county, town, city and village officers and the various forms of local government according to the laws of the State of Minnesota applying to organized counties and lesser political subdivisions. That said City of Bemidji is the County Seat of said County and is a municipal corporation organized under the laws of the State of Minnesota as a City, and contains within its corporate limits about seven thousand inhabitants, and in connection with other municipalities, namely, villages under separate organizations but immediately adjacent to the limits of said City, and which are commercially a part of said City, constitutes a community with a population of about nine thousand people (R., 51).

That Bemidji was organized as a village in 1898; that since that time it has been a growing and thrifty town, increasing rapidly in population, and the country tributary thereto has had and enjoyed a like growth. The said City contains many blocks of substantial business buildings, hundreds of beautiful and costly residences, nine churches, four costly school houses, a costly public library, a court house and other county property of the value of at least $100,000, ten hotels, an extensive system of water works and electric light plant. The City is situated on five lines of railroads, three being either transcontinental or parts of transcontinental lines, and said City is now recognized as the metropolis of the north central portion of Minnesota.

That within distances varying from 40 to 150 miles of the City of Bemidji, on the lines of railroad to which reference has been made and which pass through said City, there are 100 towns and villages; that the assessed taxable value of real

and personal property in the City of Bemidji is the sum of $1,615,572; that the assessed taxable value of real and personal property in said County of Beltrami is the sum of $6,881,175; that the assessed valuation of all the Counties affected by the said Treaty of 1855 was in the year 1909, $93,910,142. That many farms have been opened up in all directions from the said City of Bemidji, and the country adjacent thereto not already opened up is rapidly being taken up and converted into farms; that all the country lying within the exterior boundaries of the territory covered by said Treaty of 1855 is now populated with white people (R., 52-53).

That at the time of the making of said Treaty of 1855 the land ceded by the Chippewa Indians under said treaty was a vast wilderness, altogether uninhabited by any civilized people; that since the making of said treaty and the acquisition of the territory therein ceded within the limits of the State of Minnesota, the country so ceded, with the exception of segregated portions thereof included within the reservations retained by the Indians under treaties between said Indians and the United States, has been largely developed, gradually at first, but with phenomenal rapidity within the last fifteen years, and, with the exception of a portion of such territory now included within the Red Lake Reservation, all of said lands has become populated with white and civilized people, has been opened up to settlement, and with the exception of a few square miles of land remote from railroads and streams, all such territory is organized under political sub-divisions of the State of Minnesota, and in the various communities in said territory, except in very remote portions, with a degree of civilization as advanced as in the older parts of said State, and in the larger portion of said territory various branches of industry have been established, and commercial interests have grown up, and the circumstances existing at the time of the making of said Treaty of 1855 have materially and completely changed. That according

to the returns of the United States Census of 1910 there is now in the Counties affected by said Treaty of 1855 a total white population of 382,191 (R., 62, 63).

That there is a large strip of territory completely surrounding the said Red Lake Reservation, said strip being a part of the Red Lake Reservation ceded to the United States during the year 1890, pursuant to the provisions of the Act of Congress of January 14th, 1889, which is admitted by the officers of the United States Government to be exempt from the provisions of any treaty relative to the introduction of intoxicating liquors " into the Indian country," and that the sale of intoxicating liquors in the territory between said Red Lake Reservation and the City of Bemidji, and the territory immediately surrounding the same, is permitted by the United States Government, and there exists a strip of land about 15 miles in width into which it is lawful, and so admitted by the Interior Department of the United States, to introduce intoxicating liquors, and in which territory there now are, and for more than six years last past have been, seven saloons engaged in selling intoxicating liquor of all kinds. That two of said saloons are within one and a half miles of the southern boundary of the Red Lake Indian Reservation, and in said strip and within three miles of said Reservation are three saloons selling intoxicating liquor that were conducted and in operation more than twelve years ago, and in order to reach the said City of Bemidji it is necessary for such Indians as reside on said Red Lake Reservation to cross over said strip so opened and recognized to be opened to the sale of and traffic in intoxicating liquors, and that if such Indians travel by railroad to points outside of said Reservation, and especially to said City of Bemidji, they must pass on one line of railway two saloons, and upon the other line of railroad four saloons within said territory into which it is lawful to introduce intoxicating liquors (R., 63-64).

That the laws of the State of Minnesota now, and ever

since 1866 have prohibited the sale of intoxicating liquors of any kind to persons of Indian blood without any exception or qualification, and have made a violation of this law a felony. That Indians very infrequently visit the City of Bemidji, and then only in small numbers, and for the purpose of selling berries, and there are no Indian habitations within a range of twenty miles in any direction from the said City as well as the territory surrounding it, which now is and for at least twelve years last past has been, under municipal and state government (R., 54).

That within the boundaries of said territory ceded or covered by said Treaty of 1855 there are not now any resident Indians who, or whose children, have not been for several years past allottees either under the Act of Congress of February, 1887, or January 14th, 1889. That each and all of them now are and for several years last past have been full citizens of the United States. That no Indian nor his descendant having or entitled to a residence upon or within said territory, heretofore a member of the Chippewa tribe of Indians now asserts or recognizes the existence of any tribal relationship as between himself and any other Indian, and all tribal relations as among the Chippewa tribe of Indians and the several bands of Indians originally constituting such tribe within said territory, have been abandoned and set aside and are now ignored, and the members heretofore constituting such bands of said tribe within said territory now recognize no allegiance to any chief or leader or other authority among such Indians. That there are not now any Indian Reservations of any kind within such territory, and that all of the lands embraced within the exterior boundaries of said territory affected by the said Treaty of 1855 have been ceded to the United States, or have been disposed of under the laws of the United States relating to the disposition of public lands, or have been designated as forestry reserve, or have been allotted to the individual Indians, except

such small portions of land as have been retained by the United States Government at its former Indian agencies, a part of which latter is an area of land not exceeding 160 acres on what was formerly the White Earth Reservation, and upon a portion of which stand the old agency buildings and Indian school-houses, and upon which is situated the townsite of White Earth, lots in which townsite are now being sold by the United States Government to white people or Indians as applications therefor are made; and an area of about 600 acres at a point of land in Leech Lake, upon which is located the old Indian agency buildings and Indian school buildings; an area of land less than 80 acres north of Cass Lake upon which are buildings formerly used for an Indian school, and a tract of land of less than 200 acres upon which are the buildings for an Indian school at Bena, Minnesota, the use of which for such purposes has been abandoned.

That the said land at White Earth and Leech Lake upon which are located the buildings occupied by the superintendents of Indian schools and disbursing agents, is more than 40 miles distant from said City of Bemidji; that since the allotments to the Indians herein referred to the duties and authority of the Indian agents in said territory have been materially changed and modified, and the officers acting in that capacity have now practically no duties to perform, except to superintend the affairs relating to Indian schools and to disburse annuities to the Indians (R., 53, 54). Such annuities are the proceeds of the sale of the former tribal lands.

That during the fifty-five years elapsing since the making of said Treaty of 1855 no effort has been made, either by Federal or State authority, until recently, to wit, September 17th, 1909, to prevent the introduction into, sale of and traffic in intoxicating liquors in any of the territory ceded by the Chippewa Indians to the United States under said Treaty of 1855, and no prosecution has been insti-

tuted by the United States charging such introduction, except that in 1905 the United States instituted criminal prosecution against one Hugh Funk for having introduced, in violation of Article 7 of said Treaty, intoxicating liquors into the Village of Ballclub which is within said cession of 1855. That during all of that period and for more than thirty years last past licenses have been granted by State and municipal authorities to sell and dispose of intoxicating liquors in all said territory outside of said reservations, and during all of said time the United States Government has accepted, from persons who desire to engage in such business, the special tax on the business of retail liquor dealing in all of said territory, and has issued its receipts therefor, conferring upon the individuals to whom the same were issued the authority of the United States Government to sell and dispose of intoxicating liquors in quantities of less than five gallons at a time, and it has only been within the last several months that representatives and agents of the Indian Department of the United States Government have undertaken to prevent the introduction and sale of liquor in said country, or to interfere with, or molest, persons engaged in the sale and disposition of intoxicating liquors in any portion of said ceded territory (R., 56, 57).

That the defendants, especially W. E. Johnson and T. E. Brents, acting in conjunction and in unison as special officers connected with the Indian Department, as administered by the Interior Department of the United States Government, and claiming to act under authority conferred by said Article 7 of said Treaty of 1855, and the provisions of Sections 2139 and 2140 of the Revised Statutes of the United States and amendments thereof, at various towns and cities of northern Minnesota included within the territory ceded by the said Treaty of 1855, including the City of Brainerd, the county seat of Crow Wing County in said State, the village of Walker, the County seat of Cass County in said State, the village of Bagley, the county seat of Clearwater County in said State, the village of

Grand Rapids, the county seat of Itasca County in said State, the village of Park Rapids, the county seat of Hubbard County in said State, the City of Detroit, county seat of Becker County in said State, and many other towns and villages in said territory ceded as aforesaid, and in each of which places or over the inhabitants of which the jurisdiction of the State of Minnesota for all purposes of government was full and complete, and generally recognized so to be, entered upon private property where individuals and concerns were engaged in the sale of intoxicating liquors and in each of which instances the persons so concerned and engaged had licenses from the United States Government to sell at retail and also licenses from the county or municipal government to sell and dispose of such liquors under licenses authorized to be issued under the laws of the State of Minnesota, and in instances destroyed such liquors and stock, and in other instances compelled the proprietors who were engaged in the business of vending such liquors to ship the same to other and remote portions of such State, and into territory beyond the limits of the land ceded by the said Chippewa Indians to the United States under said Treaty of 1855, and then and there claimed and asserted that the City of St. Paul was the nearest point into which intoxicating liquors might be shipped, and the nearest point in the State not coming within the provisions of some Treaty against the introduction of intoxicating liquor in Indian country, and ordered and directed the proprietors of such places to close up their places of business, and to desist from further engaging in such business at said places, and threatened to arrest and prosecute such proprietors under the claim that they are unlawfully selling and disposing of liquor in "the Indian country," contrary to the provisions of the said statutes, and the said Article 7 of said Treaty of 1855; and said defendants, and especially the said T. E. Brents and H. F. Coggeshall, acting jointly and in unison, did on

the 9th day of December, 1910, order and direct twenty other saloon keepers in the said City of Bemidji holding licenses issued by the Federal Government, and municipal licenses issued under the authority of the State of Minnesota, authorizing them to sell intoxicating liquors, at retail in quantities less than five gallons at a time, to close up their places of business, and to desist further in the sale and disposition of such liquors in said City of Bemidji, and ordering and directing such saloon-keepers to ship out such stocks of goods as they had on hand, and on such day and date, to wit, said 9th day of December, 1910, the defendants T. E. Brents and H. F. Coggeshall acting jointly in the premises, and in connection with the defendant W. C. Johnson and under his instructions, ordered and commanded each of the said complainants to close up his place of business and remove and ship out his stock of liquors, of which each of said complainants then had on hand a quantity, and commanded each of these complainants to refrain from further engaging at said City of Bemidji in the business of selling and disposing of intoxicating liquors. That the defendants and each of them are now threatening in case said complainants, or either of them, fail to observe the orders so given, to enter upon the premises of each of the said several complainants, and to close up the business of said complainants, and each of them, and to destroy the stocks of liquor now in the possession of said complainants, and each of them, and the utensils and wares used and employed in the vending of same, and to ruin and destroy the established business of each of the complainants, and the said defendants, and each of them further threaten, in the event of the refusal of the said complainants or either of them to obey and recognize the orders so given, to arrest and cause to be arrested said complainants, and each of them, charged with the unlawful introduction, sale and disposition of intoxicating liquors as in "the Indian country" (R.. 55, 56).

On information and belief that defendants are not financially responsible, and that any judgment that might be recovered against them, or either of them in an action at law, would not be collectible; that the complainants have no remedy against defendants should they carry out such threats as aforesaid, but such as may be afforded in this equitable proceeding, and that unless restrained and enjoined by the court from so doing, defendants will carry out the threats so made on the ground that the complainants are unlawfully selling and disposing of intoxicating liquors in "the Indian country", and in violation of the provisions of Sections 2139 and 2140 of the United States Statutes and amendments thereof (R., 57).

Then follows the prayer of the complaint for an injunction restraining defendants from carrying out the said threats (R., 64, 65).

I.

The Jurisdiction.

This Court has not jurisdiction of this direct appeal.

In their argument to the effect that this Court has jurisdiction, the appellants contend that upon the final submission of the matter to the lower Court there must have been presented to that Court for decision

(1) Was Article 7 of the Treaty of 1855 repealed by the Minnesota Enabling Act?

(2) Did the power of Congress to regulate commerce with Indian tribes survive the admission of Minnesota to statehood, in the absence of an express reservation to this effect?

(3) Was Article 7 of the Treaty of 1855 repealed by the subsequent treaties of 1865 and 1867?

Assuming the foregoing, the appellants contend that they are entitled to take a direct appeal to this Court under Section 238 of the Judicial Code upon the three following grounds:

(1) The construction or validity of Article 7 of the Treaty of 1855 is drawn in question.

(2) The construction or application of the Constitution is involved.

(3) The construction of the Treaties of 1865 and 1867 is drawn in question.

On the question of jurisdiction we shall follow the headings of appellant's brief.

At the outset we concede that while the ground of the decision of the lower court as shown by its opinion is important in the determination of whether or not a direct appeal may be taken to this Court, it is by no means conclusive, and that if, from the record, it is clearly apparent that the case involved the construction or application of the Constitution of the United States, or drew in question the validity or construction of any treaty that this Court has jurisdiction.

(1) Is the construction or validity of Article 7 of the Treaty of 1855 drawn in question?

(a) Construction.

Article 7 is as follows:

> "The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force, within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress."

The foregoing is not only the correct wording of Article 7, but is accurate in regard to punctuation. As important hereafter, we call attention to the fact that the first clause is terminated by a semi-colon and not a comma, as shown on page 11 of appellant's brief.

The purpose of the parties to the Treaty of 1855 in incorporating this Article would seem to be perfectly clear. It had two objects in view. One to provide that the laws of Congress, present and future, regulating trade and intercourse with the Indian tribes, were to continue and be in force within the reservations created by the treaty; the other to keep in force in the ceded country (which of course excludes the reservations provided for by the treaty) until otherwise provided by Congress, the portions of said Federal laws prohibiting the introduction, manufacture, use of and traffic in ardent spirits, wines and other liquors in the Indian country. Certainly, standing by itself, Article 7 does not require any construction.

> " *Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and, consequently, no room is left for construction.* But if, from a view of the whole law, or from other laws *pari materia* the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that in effect is the will of the Legislature." *U. S. vs. Fisher*, 2 Cranch, 358.
>
> "Indeed, cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of *ambiguity* that an extended review of them is quite unnecessary." *Hamilton vs. Rathbone*, 175 U. S., 414.

The argument of appellants that Article 7 of the Treaty of 1855 is drawn in question is based upon the contention made in the lower court, and the basis of the decision of that court

as indicated by its opinion, that by the Minnesota Enabling Act Article 7 was impliedly repealed. As an examination of Article 7 shows, its language is perfectly clear. An examination of the Minnesota Enabling Act shows that it is absolutely silent on the subject of Indians. The contention of the repeal of Article 7 by the Enabling Act is based upon the fact that, without any mention whatever of Indians or pre-existing Indian treaties or laws, the first section of the Act provides:

> "That the State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever."

The phraseology of this section is clear and not open to doubt. In what manner does the contention that by the Enabling Act of Minnesota containing such a section, and without any saving clause in regard to Indian treaties, an intention is shown on the part of Congress to repeal Article 7 of the Treaty of 1855, draw in question the *construction* of that Article? It might possibly be said to draw in question the construction of the Enabling Act, but how it can draw in question the *construction* of Article 7 (when the contention is simply that it ceased to exist because of an intention claimed to have been shown by Congress in an Enabling Act to repeal it), is beyond our ability to comprehend.

The appellants cite *U. S. vs. Wright*, 229 U. S., 226, as indicating that a decision that there has been an implied repeal of one statute by another, necessarily involves the construction or invalidity of the statute decided to have been repealed.

This is a conclusion which is drawn by the appellants themselves, and not by the court in the decision.

We do not think the construction of Article 7 of the Treaty of 1855 can be said to have been drawn in question in

the sense in which it is necessary, under Section 238 of the Judicial Code, in order to give this court jurisdiction.

(*b*) *Validity.*

It is contended by appellants that the validity of Article 7 is drawn in question because of the contention, sustained by the lower court, that it was repealed by the Minnesota Enabling Act. They arrive at this conclusion by the application of the following quotation from the opinion of Mr. Justice DAY in *Champion Lumber Co. vs. Fisher*, 227 U. S., 445-451:

> "The validity of a statute of the United States * * * is drawn in question when the *existence* (the italics are appellants') or constitutionality or legality of such law is denied."

In other words, the appellants understand the court to use the word *existence* in the foregoing case in the sense of present or continued existence in fact, so that if, at any time, it is claimed that a law which had once been legally in existence had ceased to exist by repeal, that the validity, because the present existence, of such law would be drawn in question. We think the appellants have entirely misapprehended the sense in which the word *existence* is used in the language quoted.

To support the language quoted from the Champion Lumber Co. case this court cites:

U. S. vs. Lynch, 137 U. S., 280.
Linford vs. Ellison, 155 U. S., 503.
Snow vs. U. S. 118 U. S., 346, 353, and
McLean vs. R. R. Co., 203 U. S., 38.

Considering them in the chronological order of their rendition, we first turn to *Snow vs. U. S.*, 118 U. S., 346. The court held that the validity of no statute of the United States was drawn in question, the question involved being whether the authority exercised by a lower

court, under an Act of Congress, was a valid authority and within the scope of the Act.

On page 353 the court said :

> " The authority exercised by the court in the trial and conviction of the plaintiff in error is not such ' authority ' as is intended by the Act. *The validity of the existence* of the court, and its jurisdiction over the crime named in the indictment, and over the person of the defendant, are not drawn in question. All that is drawn in question is whether there is or is not error in the administration of the statute."

The words we have italicized throw some light upon the sense in which the word *existence* is used in the case quoted by appellants.

The next case cited is *U. S. vs. Lynch*, 137 U. S., 280. The opinion was by Mr. Chief Justice FULLER, and on page 285 he made use of the exact language used by this court in the Champion Lumber Company case.

The next case was *Linford vs. Ellison*, 155 U. S., 503, Mr. Chief Justice FULLER delivering the opinion, and on page 508 he quotes his language in the case of *U. S. vs. Lynch* just referred to, and in addition said :

> " In Baltimore & Potomac R. R. v. Hopkins, 130 U. S., 210–226, the question in controversy was whether a railroad corporation, authorized by Acts of Congress to establish freight stations and to lay as many tracks as ' its president and board of directors might deem necessary ' in the District of Columbia, had the right to occupy a public street for the purposes of a freight yard. It was argued that the validity of an authority exercised under the United States to so occupy the public streets was drawn in question ; but this court held otherwise and said : ' The validity of the statutes and the validity of authority exercised under them, are in this instance, one and the same thing ; and the ' validity of a statute ' as these words are used in

> this Act of Congress, *refers to the power of Congress to pass the particular statute at all*, and not the mere judicial construction as contradistinguished from a denial of the legislative power.' "

In this case Mr. Justice HARLAN dissented, and on page 512 of the report, speaking of the decision in the Hopkins case said:

> " The dispute was as to the construction, not the validity, of the Act of Congress. I cannot suppose that the Hopkins case would have been determined as it was, *if it had appeared that the authority of Congress to pass the Act referred to was drawn in question.*"

The last case cited by this court in the Champion Lumber Company case is *McLean vs. R. R. Co.*, 208 U. S., 38, the opinion being by Mr. Justice DAY, who, upon page 48, said:

> " It is not a case merely involving the construction of a legislative act of the territory, as was the fact in Snow v. U. S., 118 U. S., 346. *The power to pass the Act at all*, in view of the requirements of the Constitution of the United States, is the subject matter in controversy, and brings the case in this aspect within the second section of the Act."

In none of the foregoing cases was the question of the then present *existence in fact* of a statute drawn in question. It is our contention that when this court, in the case of U. S. vs. Lynch used the words

> " the validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied and the denial forms the subject of direct inquiry,"

the word *existence* was used, and has always been used by this court, in the sense of original constitutional and legal exist-

ence, and not in the sense of mere *existence* in fact at any subsequent time. The existence in fact of a statute is a condition precedent to the drawing in question of its validity, and the test of whether or not its validity is drawn in question is to be found in decisions of this court to which we shall now refer, and which must be read in connection with the words used in the Lynch and Champion Lumber Company cases, in order to understand the sense in which the word *existence* is used in those opinions.

Inasmuch as the words upon which the appellants depend for jurisdiction, on the ground of the drawing in question of the validity of Article 7 of the Treaty of 1855, were written by Mr. Chief Justice FULLER, we call the court's attention to a case, preceding the Lynch case, in which he also wrote the opinion.

This is the case of *Baltimore & Potomac R. R. Co. vs. Hopkins* already mentioned as cited by Mr. Chief Justice FULLER in the case of *Linford vs. Ellison*. We think this may be considered the leading modern case on this subject decided by this court. The question involved was whether or not the Railroad Company had a right or authority under certain Congressional statutes having force in the District of Columbia to do certain things in streets of the City of Washington involving damage to Hopkins. It was contended that this court had jurisdiction by writ of error because there was drawn in question the validity of the statutes under which the authority was claimed and of the authority itself. The writ of error was dismissed on the ground that the validity of no authority or statute was involved.

The court in its opinion lays down the test by which to determine whether or not the validity of a statute is drawn in question, on page 224, in the following words:

> " *Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open*

to denial and denied, the validity of such statute is drawn in question, but not otherwise.

"In *Millingar vs. Hartupee*, 6 Wal. 258-261-262, it was held that the word 'authority' stands upon the same footing with 'treaty' or 'statute'; and said the court, through Chief Justice CHASE, 'something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a *real existence derived from competent governmental power*. If a different construction had been intended Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States.' 'In many cases, the question of the existence of an authority is so closely connected with the question of its validity that the court will not undertake to separate them, and in such cases the question of jurisdiction will not be considered apart from the question upon the merits, or except upon hearing in regular order. But where, as in this case, the single question is not of the validity, but of the existence of an authority, and we are fully satisfied that there was and could have been no decision in the State court against any authority under the United States *existing in fact*, and that we have, therefore, no jurisdiction of the case brought here by writ of error, we can see no reason for retaining it upon the docket.'"

On page 226 is contained the portion of the opinion quoted and already referred to in *Linford vs. Ellison*.

In *Clough vs. Curtis*, 134 U. S., 361, Mr. Justice HARLAN, on pages 369, 370, makes the following statement:

"In this respect the present case differs from the B. & P. R. R. v. Hopkins, 130 U. S., 210, 225, upon writ of error to the Supreme Court of the District of Columbia. In that case it was held that the words in the Act of March 3rd, 1885, 23 Statutes 443, C. 375, the validity of a 'statute of or an authority exercised under the United

> States' do not embrace a case, which depends only on a judicial construction of an act of Congress, *there being no denial of t e power of Congress to pass the act, or of the right to enjoy whatever privileges are granted by it.*"

In *New Orleans vs. N. O. Water Works Co.*, 142 U. S., 79, the court, by Mr. Justice BROWN, on page 87, approves the wording of the opinion in *Millingar vs. Hartupee* before referred to.

In *Miller vs. Cornwall R. R. Co.*, 168 U. S., 131, Mr. Chief Justice FULLER uses the following language on page 133:

> "The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial and is denied" (*B. & P. R. R. Co. vs. Hopkins*, 130 U. S., 210-224).

In *Sweringen vs. St. Louis*, 185 U. S., 38, this court, by Mr. Justice PECKHAM, on page 44, said:

> "In the Hopkins case, *supra*, it was held that the validity of a statute is drawn in question when the power to enact it is fairly open to denial and is denied, but not otherw se."

Is it not perfectly clear under the decisions to which we have last called attention that the word "*existence*" was used in the Champion Lumber Company, Lynch and other cases in the sense which we have imputed to it, and that the test of whether or not the validity of a statute is drawn in question is the one laid down by Mr. Chief Justice FULLER? Possibly the clearest and best evidence of this is the fact that in *Linford vs. Ellison* the Chief Justice quotes from both the Lynch and Hopkins cases, showing conclusively that, in his opinion, and that of the court whose decision he was rendering, the statements contained in both opinions amounted to

the same thing. The test laid down in the Hopkins case is one to which the words used in the Lynch case can be easily reconciled in the manner we have suggested, whereas if the word *existence* is used in the sense contended for by the government in this case, there is an irreconcilable conflict between the decisions. No better illustration of the difference between the contention of appellants and the one announced by Mr. Chief Justice FULLER can be conceived of than the case at bar, and the case of *U. S. vs. 40 Gallons of Whiskey*, 93 U. S., 188. In that case the validity of the Article, similar to Article 7 of the Treaty of 1855, was directly drawn in question, because the *power of Congress to enact it* was directly denied on the ground that it was an interference with powers belonging to the State of Minnesota, whereas in the case at bar the lower court, recognizing that by the decision in the Whiskey Case this court had held that Congress had the *power* to place such a provision in a treaty and keep it in force within a state, simply decided that it had not exercised that power, but had done the contrary, namely, repealed such a provision by an Enabling Act not referring to or saving it. In this case no one challenges the validity, namely, the power of the United States and the Indian tribes to enter into the agreement containing Article 7, or the *power* of Congress to keep it in force after the territory became a state.

If the contention of appellants were upheld, the calendar of this court, which it was sought to relieve by the Court of Appeals Act of 1891, would be congested even more than it now is, by appeals from decisions simply involving the repeal of previously existing *valid* statutes or treaties, whereas such cases should go to the Circuit Court of Appeals where this case should have gone.

(2) Is the construction or application of the Constitution involved?

Under this heading appellants apparently contend that the construction or application of the Constitution of the

United States was involved because, to quote from page 19 of the brief:

> " In the absence of an express reservation in favor of Congress in the Enabling Act, the question was which power should prevail in the resulting conflict, or, in other words, is the power of Congress broad enough to survive the creation of a state out of territory in which Indians are situated. The construction of the Constitution was thus involved within the meaning of Section 238 ".

It is very hard for us to take this contention seriously. The lower court was perfectly conversant with *U. S. vs. 40 Gallons of Whiskey*, and *Dick vs. U. S.*, 208 U. S., 340. In his opinion (R., 26, 27) the lower court said:

> " It may be argued that the authority of the case of U. S. v. 43 Gallons of Whiskey has been somewhat qualified by what was said in the case of Dick v. U. S. and by the fact that the case of U. S. v. Sutton, *supra*, was put upon somewhat different grounds. It was nevertheless, in the first case distinctly held that *Congress had the power not only to prohibit the introduction of liquor into Indian reservations, into what was in fact Indian country, but also to prohibit the introduction of liquor into adjoining country, not Indian country, but within the limits of an organized State. So far as this court is concerned that statement must be considered as binding upon it. The law must be considered as settled that Congress has the power to prohibit the introduction of liquor into lands not Indian country, but adjoining it, within the limits of a State.* But when this is admitted and conceded, the present case is not yet, in my judgment, resolved. The question here presented is not a question as to the power of Congress, and I have already said, it is within the power of Congress, after a State has been admitted to the Union, to prohibit the introduction of liquor into not only Indian country, but

into the adjoining country. That it had that power before the State was admitted, and while the land was within the limits of the territory is unquestioned. At the time when the Treaty of 1855 was negotiated the Government undoubtedly had the power to insert therein the provisions therein contained. *So it is not at all a question of power*, but it is a question whether that provision in the Treaty of 1855 is still in force, or whether any subsequent act of Congress has modified or repealed it."

Nothing that we can add can make it any clearer that the lower court not only did not consider that it was open to question that Congress had the power to bring into existence Article 7 of the Treaty of 1855, but to continue it in existence after the State was admitted to the Union, and that the ground upon which he decided adversely to the defendants, and to the existence of Article 7, was that by the wording of the Enabling Act of Minnesota Congress had shown its intention *not to exercise its power* within the limits of Minnesota after it became a State. It seems to us to take a very vivid imagination to see that the application or construction of the Constitution was involved in this case, or by the decision in it.

(3) Is the construction of the Treaties of 1865 and 1867 drawn in question?

For the reasons and upon the authority of the cases cited in our attempt to answer the proposition contained in (1) of appellants' brief, as to whether the construction of the Treaty of 1855 is drawn in question, we contend that the question whether or not the Treaties of 1865 and 1867 repealed Article 7 of the Treaty of 1855 does not involve the construction of the later treaties. The Treaties of 1865 and 1867 are absolutely silent on the liquor question, and as we have suggested, Article 7 of the Treaty of 1855 is too clear in its phraseology to leave any office for construction to perform. We do not,

therefore, conceive that the construction of the Treaties of 1865 and 1867, or either of them, was drawn in question.

Counsel has himself suggested under this heading that it will undoubtedly be argued that this question was not decided by the court upon the demurrer, and that for that reason the present appeal will not lie on this ground. It is suggested that the court may have entered its decree upon an entirely different opinion, unuttered, than the elaborate opinion rendered in the decision on the demurrer.

We submit that upon the record the presumption is that the court was satisfied with its decision upon the demurrer and therefore adopted it as a basis for entering its decree.

We call the court's attention to the fact that the matters referred to on page 25 of appellants' brief as having been subsequently pleaded in the amended bill and issue taken thereon in the amended answer involving the Treaties of 1865 and 1867 are conclusions of law pure and simple. The only *facts* in regard to the treaties of 1865 and 1867 alleged in the amended bill and amended answer are not sufficient to justify the position taken by counsel, that *facts* pleaded in the amended bill draw in question the construction of either of the treaties of 1865 or 1867. If every time an unambiguous statute or treaty is claimed to have been impliedly repealed by another unambiguous statute or treaty, there is drawn in question the *construction* of the one claimed to have been repealed, this court has jurisdiction under heading (1) or (3), but if that is the law, the purpose of the Court of Appeals Act and its successor, section 238 of the Judicial Code, will have been largely frustrated and the overcrowded calendar of this court rendered infinitely more congested by floods of direct appeals that we believe it was intended should go to the Circuit Courts of Appeal.

II.

The Merits.

Still following the frame-work of appellants' brief we come first to their contention (1) **Article 7 of the Treaty of 1855 was not repealed by the Minnesota Enabling Act, nor by the Act admitting that State into the Union.**

Under this heading appellants deal with the ground upon which the Trial Court based its decision. As we have already set forth by quotation from the opinion of the lower court, the decision was based *not upon any lack of power on the part of the United States by treaty with the Indians to keep Article 7 in force after Minnesota became a State*, but solely for the reason that by the Act admitting Minnesota into the Union Congress had shown its purpose *not to exercise that power within the borders of Minnesota after it became a State.*

Appellants in their brief under this heading again seek, as they did in trying to establish this court's jurisdiction on the ground that the Constitution is involved, to show the existence before the lower court of a controversy between the State and Federal authorities in regard to commerce or relations with the Indians, such controversy being supposed to be based upon the power of Congress, under the Federal Constitution on the one hand, and the general police power of the State of Minnesota on the other. It being perfectly clear from the opinion of the lower court, already quoted, that no such controversy was decided by the Court, we shall pay no further attention to this suggestion.

The argument under this heading being directed against the grounds upon which the lower court based its opinion, and that opinion being elaborate and printed in full in the record, we shall depend upon it to speak for itself, contenting ourselves with briefly pointing out a few reasons not contained in

the opinion why the decision upon this ground should be sustained.

In the first place, there can be no dispute whatever over the fact that, under the commerce clause of the Constitution, Congress has the power to regulate all intercourse with Indian tribes, and that that power has by this court been enlarged to include intercourse with individual tribal Indians as well as tribes. Pursuant to the power conferred by the commerce clause of the Constitution, Sections 2139 and 2140 of the Revised Statutes of the United States, as amended, were enacted and have been in force. Those sections, by their own force and without any treaty stipulations to assist them, would have been amply sufficient to have prevented the sale of liquor to Indians, and to have prevented the introduction, etc., of liquor into what was *in fact* Indian country. It is true the first clause of Article 7 of the Treaty of 1855 extended the present and future laws of Congress regulating trade and intercourse with the Indian tribes to the reservations provided for in the Treaty, but we take it that there can be no question but that these laws would have been *ipso facto* extended to these reservations upon their creation as such.

It is upon the legal existence and force of the second clause of Article 7 that appellants must depend. That portion of the Article arbitrarily makes *Indian country* out of approximately twenty-one thousand square miles of land (over 13,000,000 acres) involved in the cession (irrespective of whether or not it should be so in fact) until otherwise provided by Congress. This provision is not a natural or normal one, and it cannot be said to be made in the exercise of the power conferred upon Congress by the commerce clause of the Constitution. Article 7 is made by virtue of the treaty-making power and the peculiar relations with the Indian tribes. Under normal conditions the scope of Revised Statutes of the United States having to do with Indian country, such as those involved in this case,

prohibiting the introduction, etc., of liquor into Indian country, would be worked out by the courts, and would be dependent upon the definition of Indian country upon which this court should settle, in the absence, of course, of any authoritative definition by Congress.

This court has settled upon such a definition in *Bates vs. Clark*, 95 U. S., 204, where, on page 208, Mr. Justice MILLER, delivering the opinion of the court, said:

> " The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case."

That rule has been affirmed and adopted by this court many times since, and it is to-day the judicial test by which to determine whether or not certain territory is Indian country. Since it was laid down by this court Congress has enlarged this definition of Indian country by Chapter 109 of the Act of January 30th, 1897 (29 Statutes at Large, 506) which amends Sections 2139, 2140 and 2141, R. S. By this Act Congress added to the definition laid down in *Bates vs. Clark*, the following

> " which term shall include any Indian allotment while title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States."

The history of Indian treaties, and decisions of this court dealing with the Indians, will not be found very prolific of treaty or statutory provisions having the purpose of Article 7

of the Treaty of 1855, by which over twenty-one thousand square miles of land in a State are arbitrarily made Indian country, irrespective of how many acres of such land were *in fact* Indian country. We challenge the Government to produce a single similar instance where, by treaty or statute, Congress has brought into the Union a State within whose limits it has arbitrarily made nearly one-third of its territory artificial Indian country. Under the circumstances is it not apparent that Congress would be doing the *normal*, not the unusual, thing in repealing Article 7 by the Act admitting Minnesota into the Union entirely silent on the subject? Is it not the reasonable result of the fact that, without any such arbitrary provision, the Revised Statutes, in reference to the sale of liquor to the Indians or the introduction of liquor into Indian Country, would, by their proper enforcement, protect the wards of the Government, or, if not, that Congress could by appropriate legislation under the commerce clause have made Indian country of a strip of Government land of such width surrounding the reservations as would be sufficient to keep such lands from being a base from which to introduce liquor into actual Indian country, without forcing prohibition on 382,000 white persons?

With these suggestions we leave the opinion of the lower court to speak for itself.

(2) Article 7 of the Treaty of 1855 was not repealed by the Treaties of 1865 and 1867.

This proposition of appellants is based upon the theory that the contended repeal of Article 7 by said Treaties is dependent upon the rule that a reconveyance to the original grantor of land to which a covenant relates has the effect of extinguishing the covenant, and that inasmuch as the reconveyance of tracts 507 on our map were not to the original grantors under the Treaty of 1855, but to one of them only, namely the Mississippi band, that, therefore, the rule is not applicable in this case; and second, that even if the recon-

veyance may be regarded as to the original grantors it is not to be supposed that the operation of treaties is governed by any such technical rule of property.

We think appellants entirely misconceive the scope of the argument that Article 7 was repealed by the Treaties of 1865 and 1867. It is not based upon any technical rule of property. By the Treaty of 1855 the three bands of Indians ceded to the United States the approximately twenty-one thousand square miles of land, being the largest tract inclosed in red upon our map and marked 357. There were excepted from that cession the reservations created for the Mississippi band by the Treaty of 1855, and marked Nos. 453, 455, 456 and 457 on our map, as well as the reservations provided for the other two bands and marked, on our map, 358 and 359. The first clause of Article 7 did not refer to the ceded territory, but referred merely to the reservations which we have just mentioned, provided by the Treaty for the three bands who were parties to it. It is only the second clause of Article 7 in regard to the introduction of liquor into Indian country which applied to the ceded territory.

When the Treaty of 1865 was entered into the situation was as follows—the Mississippi band of Chippewas was the owner of four reservations within the exterior limits of the cession of 1855. These reservations were not covered by the second portion of Article 7. They were simply, as Indian reservations, subject to all of the laws of the United States regulating commerce and intercourse with the Indian tribes which would naturally be in force on reservations, which were Indian country in fact. The parties to the Treaty of 1865 were the United States on the one part, and the three bands of Chippewa Indians who were parties to the Treaty of 1855 on the other. By that Treaty the Mississippi band ceded unreservedly to the United States its four reservations which had been set aside for it in the Treaty of 1855. In return therefor the United States ceded to the Mississippi band the descrip-

tions marked on our map 507, except so much thereof as involved the reservations 358 and 359, belonging to the other two tribes, which had been set aside by the Treaty of 1855. Counsel says that this cession No. 507 was to only one of the tribes, namely the Mississippi band, but the other two tribes were parties to the Treaty, and must naturally be considered by their participation to have placed the Mississippi band in the same position, so far as title was concerned, as would have been the case had it been ceded to all three.

When in 1867, in return for the White Earth reservation, marked on our map 509, the Mississippi band of Chippewas re-ceded tracts 507 to the United States, they ceded the same title and with the same right and power over those descriptions that the three original tribes would have had, and the three original tribes would have unquestionably been able to *recede this property free and clear of Article 7 of the Treaty of 1855.*

On page 43 of their brief appellants argue that "if Congress had specifically provided that Tract A (our 357) should be Indian country in spite of this original cession, and the consequent extinguishment of the Indian title thereto, no one would contend that the reconveyance of a part of that Tract (Tract C) or even the whole of it to the Indians would have any effect on the operation of the statute."

We do not contend that an Indian treaty will necessarily repeal an act of Congress, but we do maintain that a treaty between certain bands of Indians and the United States can modify or repeal a prior treaty between the same parties. *Wiggan vs. Connolly*, 163 U. S., 56-60.

It is not necessary to contend that Article 7 was repealed by the treaties of 1865 and 1867. *The contention really is that 507 was withdrawn from the territory subject to it.*

Under a heading numbered (3) on page 44 of their brief appellants consider the last assumed ground of

contention that Article 7 of the Treaty of 1855 is no longer in force, under the heading

> **"Article 7 of the Treaty of 1855 had not expired at the time of the acts complained of in the bill by reason of any change in the character of the territory to which it applied."**

We at this point depart from the plan we have been pursuing of simply meeting the propositions urged by the appellants, and consider the contention we now desire to make under a heading of our own, as follows:

> **"Article 7 of the Treaty of 1855 had expired at the time of the acts complained of in the bill by virtue of the provisions of the Act of Congress of January 14, 1889, 25 Statutes at Large, 642, entitled, 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota,' the cessions made to the United States by the Chippewa Indians of Minnesota pursuant to said act, and by reason of the change in the character of the territory included in the Treaty of 1855 and the status of the Indians therein."**

At the outset we desire to call the court's attention to pages 53 and 54 of appellant's brief, at the point commencing on page 53 with the words "finally the need for protection cannot be over-emphasized." Then follows a statement about the situation among the Indians supposed to have been obtained from the 1912 Report of the Commissioner of Indian Affairs, followed by a quotation from the Report. Upon what theory any of it is properly included in the brief we are unable to perceive. The alleged facts are not contained in either the amended bill or amended answer, and have no proper relevancy or materiality to the issues here involved.

We trust the Court will pardon us some repetition in laying the foundation for the point we now wish to make.

By the Treaty of 1855 between the United States and the three bands of Chippewa Indians a certain description, 357 on our map, containing approximately 21,540 square miles, the exterior boundaries of which are shown on our map in red, was ceded by the Indians to the United States. There were within those exterior boundaries certain tracts which were not ceded to the United States, but which were retained by the Indians as reservations. Nos. 453, 455, 456 and 457 were retained as reservations for the Mississippi band. Other descriptions which are shown on our map as 358 and 359 were retained for the Pillager and Lake Winnebegoshish bands.

Article 7 of the Treaty of 1855 contains two distinct provisions. The first one provides

> " the laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several *reservations* (italics ours) provided for herein ; "

As the most cursory examination shows this portion of the Article applies only to the reservations set apart for the three bands. It was entirely unnecessary and is simply declaratory of the laws of the United States regulating trade and intercourse with the Indian tribes, which would have been in force in the reservations irrespective of this provision in Article 7. It does not provide, like the second clause, that such laws, or any portions thereof, shall be in force within the reservations *until otherwise provided by Congress.* The only reasonable construction that can be placed upon it, and one which would seem to be too clear for controversy, is that *so long as the several reservations provided for by the Treaty of 1855 should remain reservations,* namely Indian country in fact, the laws regulating trade and intercourse with the Indian tribes should continue and be in force within them.

It must be borne in mind that, by the Treaty of 1855, the three bands of Chippewa Indians gave up *no part* of their

right, title and interest in and to any of the reservations provided for in said Treaty.

The second part of Article 7 provides

> "and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force, within the entire boundaries of the country *herein ceded* to the United States, until otherwise provided by Congress."

This portion of Article 7 applies merely to the ceded territory. Not only was it not necessary as to the reservations, but the language does not permit of its application to them.

By the first clause of the Article *all* of the laws, and *every part* of them, regulating commerce and intercourse with the Indian tribes, were *to continue and be in force* within the several *reservations* provided for by the treaty. Manifestly if that be true, there could be no sense or purpose in also providing that certain portions of the same laws should be in force in the *reservations* until otherwise provided by Congress.

By the first clause, and without it, all of 2139, 2140 and 2141, including of course the prohibition against the introduction, etc., of liquor in Indian country, would be in force in the reservations, they being Indian country in fact. Therefore the second clause of the Article only applied to the *ceded territory.* On no other theory can it be sensibly construed. It is clear and unambiguous.

It was necessary as to the territory ceded to the United States, because without it, the Indian title being extinguished, the ceded territory would no longer be *Indian country in fact.* The Indian title having been extinguished in the ceded territory, manifestly only one purpose could have actuated the Indians and the United States Government in including the second portion of Article 7 in the Treaty of 1855, namely, for the purpose of protecting, *from the out-*

side, the *reservations*, created by the Treaty of 1855, and the Indians upon them. The situation then, when the Treaty of 1855 was ratified, was (as we have stated), that the first clause of Article 7 (unnecessarily, we think), applied the laws of the United States regulating commerce and intercourse with the Indians to the reservations provided by the Treaty *as long as they were reservations*, viz., Indian country in fact; the second portion of that Article arbitrarily made Indian country out of the property ceded to the United States until otherwise provided by Congress.

The Treaty of 1865 was, as we have stated, between the same three bands of Indians and the United States. It really did not involve the conveyance of anything to the United States by two of the bands. They simply consented to a "deal" between the Mississippi band and the United States. By that "deal" the Mississippi band ceded, absolutely without restriction of any kind, to the United States, the reservations which had been set apart for it in the Treaty of 1855. By that cession those reservations *ceased absolutely to be Indian country in any sense whatever*, and being no longer reservations or Indian Country the first portion of Article 7, of course, no longer applied to them. They became the property of the United States in fee simple. This would seem to be perfectly clear when it is remembered that the second clause of Article 7, which was to remain in force until otherwise provided by Congress, *applied only to the ceded territory*. In consideration of this absolute cession by the Mississippi band to the United States of these reservations, the United States agreed with the three bands of Indians to set apart as the future home of the Mississippi band, so much of a description, indicated on our map as 507, as should not include or interfere with the reservations, 358 and 359, provided by the Treaty of 1855 for the Pillager and Lake Winnebegoshish bands. We contend that

by the Treaty of 1865 reservations 453, 455, 456 and 457 became *wet territory.*

By the Treaty of 1867 the Mississippi band receded 507 to the United States and was given in exchange 509, which was thereafter known as the White Earth Reservation. In 1889, in recognition of the changing status of the Indians involving the dissolution of tribal relationship and the desirability of substituting therefor an independent personal and property status for the Indians (Matter of Heff, 197 U. S., 488; U. S. vs. Celestine, 215 U. S., 278, 290), Congress passed an act, to which reference has already been made, entitled "An Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota." By this Act the President was authorized and directed to appoint three Commissioners to negotiate with the different bands or tribes of Chippewa Indians in the State of Minnesota for the *complete cession and relinquishment of all their title and interest in and to all their reservations in said State*, except so much of the White Earth and Red Lake Reservations as, in the judgment of the Commissioners, was not required to make the allotments provided for by said Act. It was further provided in and by that Act that "the acceptance and approval of such cession and relinquishment by the President of the United States shall be deemed full and ample proof of the assent of the Indians *and shall operate as a complete extinguishment of the Indian title, without any other or further act or ceremony whatsoever for the purposes and upon the terms in this Act provided.*" It is a fact alleged in the bill and admitted in the answer that the provisions of this Act were carried out in their entirety. The Commissioners appointed, negotiated with the Indians and received from the Chippewa Indians in the State of Minnesota an absolute and unrestricted cession of all their land in the State except a portion of the Red Lake and White Earth Reservations. There are now no *reservations* left in the territory ceded by the

treaty of 1855, and all of the land previously contained in reservations has been ceded to the United States, or allotted to Indians, except about 1,040 acres used by the Government at the White Earth Agency, the Leech Lake Agency, at Bena, and north of Cass Lake.

Pursuant to the Act of 1889 there was conveyed to the United States by the Chippewa Indians, reservations 358 and 359, both within the limits of 507. These two reservations having been set apart for the Pillager and Lake Winnebegoshish bands of Chippewas by the Treaty of 1855, had exactly the same status as the reservations set apart in that treaty for the Mississippi band. The second clause of Article 7 never applied to them, and upon their conveyance in *fee simple* to the United States in 1890, pursuant to the Act of 1889, *all portions of them so conveyed thereby ceased to be Indian reservations or to be Indian country in fact.* They were equally, with the Mississippi reservations ceded to the United States by the Treaty of 1865, *wet territory.* Portions of these two reservations were of course allotted and such of these allotments, as to which the trust period had not expired, remained Indian country within the liquor laws of the United States. There are, however, allotments in these two former reservations which are now *absolute.* They are also *wet country.*

It is alleged in the bill and admitted in the answer that the diminished Red Lake reservation is entirely surrounded by a *wet strip*, the same having been conveyed to the United States in 1890 by the Indians, pursuant to the Act of 1889. Upon this strip are saloons in the closest proximity to the reservation and between the reservation and Bemidji. The entire Act of 1889 recognizes the utter lack of tribal government or titles in land, for the conveyances made pursuant to that Act were made by innumerable individual Indians, including the necessary majorities of the three tribes who were parties to the Treaty of 1855.

Assuming that we have correctly stated the facts and drawn the proper conclusions of law in regard to the status of the territory claimed to be covered by Article 7 of the Treaty of 1855 at the time the acts complained of in the bill occurred, let us now call the court's attention to the absurdity to which it reduces the Government's contention.

The contention of the Government under its heading (3) pages 44–54 of its brief, amounts to this—that Article 7 of the Treaty of 1855 has not expired because there are still Indians, over 7,000 of them, who need protection from over-indulgence in intoxicating liquors. These Indians seem to appeal to the appellants as being essentially tribal Indians, notwithstanding the fact that the reservations within the ceded territory are gone, and there are in existence only several small agencies, which exist for the most part for the purpose of paying the Indians annuities *out of their own money realized from the sale of their own lands*, and notwithstanding the fact that all *actual* tribal existence is at an end (R., 53). The Government would apparently have this court receive the impression that these Indians are protected from the sale of liquor in their vicinity, if only Article 7 of the Treaty of 1855 is declared to be in force. What are the facts in regard to this? The facts are that these Indians are surrounded by territory in which liquor is lawfully obtainable. *The former Mississippi reservations ceded to the United States in 1865 are such territory; so much of the Leech Lake and Lake Winnebegoshish reservations as were conveyed to the United States in 1890 are such territory; every allotment from either of the last two reservations as to which the trust period has expired is such territory; land sold to white men in these two former reservations is such territory; the wet strip admitted to surround the Red Lake reservation is such territory.* Congress must be considered as knowing all this when it enacted the act of 1889. When the cession of 1855 is already dotted with

wet territory how can the Government ask or expect this court to hold that, by an article of a treaty entered into nearly sixty years ago, when the country here involved was a wilderness, *absolute and involuntary prohibition shall be forced upon a white population of over 380,000 people*, and within boundaries containing nearly one-third of the State of Minnesota, having property with an assessed taxable value of over $93,000,000, and filled with thriving cities, towns and villages, and with the railroads, trades, industries and other evidences that show a high state of civilization and development? That Congress never contemplated such a thing is evidenced not only by the Allotment Act of 1887 and the Act of 1889, but by the Act of January 30th, 1897 (29 Statutes, 506), amending Sections 2139, 2140 and 2141 of the Revised Statutes. By this Act allotments during the trust period are made Indian country, showing not only the purpose of Congress to modify the laws in regard to the sale and introduction of liquor in Indian country, so as to harmonize with the changed situation brought about by the Allotment Acts, and provide proper protection for Indians residing upon allotments in an incomplete state, but it clearly shows the understanding by Congress that *such an amendment was necessary*. It is part, and a most significant part, of the entire change in the status of the Indians, and the relation of the United States to them intended by and growing out of the allotment policy. The Government's brief seems to proceed upon the theory that wherever there are Indians whose emancipation is not complete, this court and every one else should be glad to join with it, *at no matter what cost to the surrounding country or white population thereof*, to make it impossible for intoxicating liquor to be where it is humanly possible for them to get it. The idea seems to be that because this is a laudable object all rights must yield to it. It is respectfully submitted that the mere general and laudable desire of the

Government to protect its Indian wards from the ravages of intoxicating liquor, is not a sound basis upon which to work out the respective rights of the State of Minnesota in nearly one-third of its territory, and of 380,000 of its white inhabitants.

A distinction must be made between the relation of guardian and ward as applied to the United States and the Indians, and the existence of actual *tribal relations*. All cases in this court, such as the case of *Tiger vs. Western Investment Co.*, 221 U. S., 286, having to do with any of the Five Nations are not in point here, for the reason that the tribal governments and existence of those tribes or nations has been recognized and continued in force by statute.

In the case of *U. S. vs. Sandoval*, 231 U. S., 28, the Indians there dealt with are stated, in the opinion of the court, to have still owned their land by tribal or communal title. On page 231 of the opinion appears the following :

> " As before stated, whether they are citizens is an open question, and we need not determine it now, because citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of *tribal Indians* (our italics) as a dependent people. Citing cases."

The first case cited is a case involving one of the Five Nations, and the others have reference to the wardship and not the tribal existence of the Indians involved.

As this court has said, the duration of the existence of the relation of guardian and ward is for Congress to determine, and, notwithstanding the meagre duties of the Chippewa Indian agents still existing in Minnesota, we have no disposition to question that the United States is still exercising certain protective care over the Chippewas as to whose allotments the trust period has not expired, but we contend that by the very

terms of the Act of 1889, which we have quoted, the *Chippewa Indian tribal title to all lands in Minnesota except the portions of the White Earth and Red Lake Reservations excepted by the Act, had at the date of the acts complained of, been absolutely extinguished.*

The question of title must be considered in working out the rights of both parties. The Indian tribal title to lands within the boundaries of the cession of 1855 is absolutely gone. The territory is essentially a territory of white men. Every reasonable effort on the part of the Government to protect the Indians over which its guardianship still exists is an obligation of the highest order, but there is no right or justice in following it to the exclusion of the rights of hundreds of thousands of white inhabitants and citizens of the State of Minnesota, and that is the result asked for by the Government in this case by its attempt to enforce the provisions of Article 7 after allowing them to sleep, with the exception of one prosecution, for over fifty years.

Unless by the language used by this court on page 486 of the case of *Perrin vs. U. S.*, 232 U. S., 478, it was intended to hold that only under the *exact* circumstances stated would a prohibition of this sort be held arbitrary and therefore invalid, it is submitted that this state of facts presents as strong a case for such a holding as is ever likely to come before this court. In the Perrin case the section of territory involved was all reservation and originally contained 400,000 acres. The great bulk of the territory sought to be covered by Article 7 of the Treaty of 1855 has for more than fifty years been non-reservation land, and instead of 400,000 acres it contains over 13,000,000 acres. The land involved in the Perrin case contained 625 square miles, while the land involved here contains over, approximately, 21,540 square miles. While the territory involved is not the entire State of Minnesota, it is equal in area to Massachusetts and Maryland combined.

Conclusion.

It is respectfully submitted that this direct appeal presents no questions of which this court has jurisdiction, and that Article 7 of the Treaty of 1855 was not in force at the time of the acts complained of in the bill, and that the judgment of the District Court should be affirmed.

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Key to Map on Opposite Page.

The numbering adopted on the map opposite this Key is the numbering used in indicating the same Indian land cessions upon the maps contained in Part II. of the 18th Annual Report of the Bureau of American Ethnology.

357 (bounded by red border) represents tract of land ceded by the Mississippi, Pillager and Lake Winnebegoshish bands of Indians to the United States under the Treaty of February 22nd, 1855 (10 Stat., 1165).

453, 455, 456 and 457 represent reservations provided by the Treaty of 1855 for the Mississippi band and ceded to the United States by that band pursuant to Treaty of March 20th, 1865 (13 Stat., 693).

358 and 359 represent the reservations reserved for the Pillager and Lake Winnebegoshish bands by the Treaty of 1855, the title to which was conveyed to the United States by the Indians pursuant to the Act of January 14th, 1889 (25 Stat., 642).

507 (bounded by blue border) represents tracts set aside as home for the Mississippi band under Treaty of 1865, *supra*, and re-ceded to the United States by that band under the Treaty of March 19th, 1867 (16 Stat., 719).

509 (bounded by blue border) represents land set apart for the Mississippi band by Treaty of 1867, *supra*, in exchange for 507.

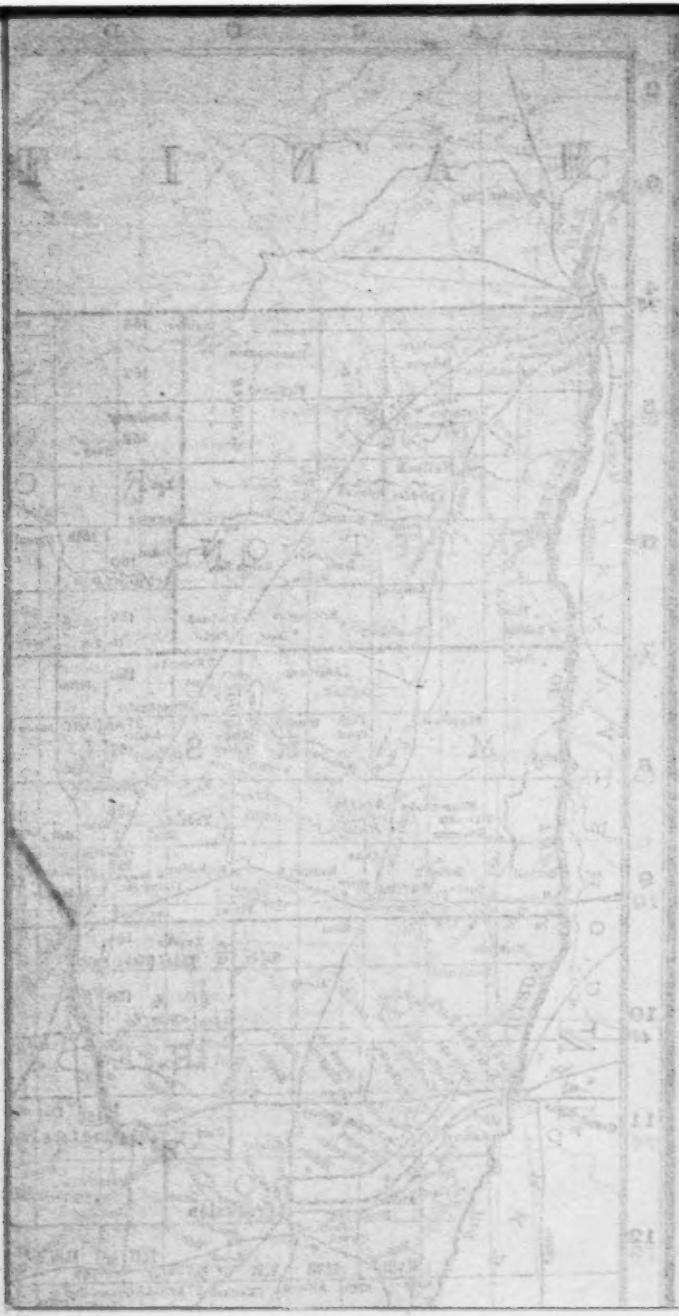
MAPS

TOO

LARGE

FOR

FILMING



[11424]

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

W. E. JOHNSON, T. E. BRENTS, AND H. F. Coggeshall, appellants,
v.
EDWIN GEARLDS, L. J. KRAMMER, FRED E. Brinkman, et al.
} No. 802.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

REPLY BRIEF FOR THE APPELLANTS.

CORRECTED STATEMENT.

Counsel attach to their brief a map whereon they show (by Nos. 358 and 359) two tracts which they say were the lands reserved by the treaty of 1855 as homes for the Pillager and Lake Winnibigoshish Bands. In fact, there were three tracts so set apart by Article II of that treaty. (10 Stat., 1166.) The third, not shown on their map, was, in the northern part of tract "C" on our map—507 of their map—nearer Bemidji than Nos. 358, 359, and is numbered 360. They further assert that the new home set

apart for the Mississippi Tribe by the treaty of 1865 was all of C or 507, save 358 and 359. This is wrong. No. 360 was also excepted, or else it was the sole exception, dependent on what was meant by the words "the third clause of Article II" in the treaty of 1865.

They further say "four tracts set apart for the Mississippi Band by the treaty of 1855 were surrendered by the treaty of 1865"; in fact, seven tracts were so set apart, six for the tribe and one for an individual Indian. All six were surrendered, and one of these—"the Mille Lac"—lay *outside* of A or 357, and is numbered 354.

They also state that 509 was the final reservation made by the treaty of 1867. This is wrong. There was also an area (in 507 or C) numbered 508, lying between 358 and 359 on their map. In other words, they did not re-cede the whole of 507 (as stated in their brief, p. 5).

These errors of counsel explain their inability to understand why the Pillager and Lake Winnibigoshish joined in the treaty of 1865 (their brief, p. 38). Their consent was necessary to a surrender of the Mille Lac tract, which lay *outside* of A or 357, and was not included in the cession of 1855.

JURISDICTION.

Construction or validity of Article VII.—Respondents deny that the construction of Article VII of treaty of 1855 is involved, and yet most of their brief is devoted to the contention that the words

"the country herein ceded" do not mean "*reservations,*" while we contend that the words "*within the entire boundaries of the country herein ceded*" include and mean everything with the exterior boundaries delimited by Article I of that treaty. And counsel state their contention in a parenthetical assertion on page 17 of their brief thus, "(which of course excludes the reservations provided for by the treaty)."

Counsel do not refer to the analysis of the meaning of the word "validity" made by Chief Justice Jay of this court in *Jones* v. *Walker* (our brief, p. 18). Nor does their passing reference (their brief, p. 18) to *U. S.* v. *Wright* dispose of the application of the decision to this case (our brief, pp. 16, 17). Note in this connection that the court below is quoted (their brief, p. 27) as saying that the question before it "is a question whether that provision in the treaty of 1855 is still in force, or whether any subsequent act of Congress has modified or repealed it," and the statement of the court that "a treaty may supersede a prior act of Congress." *Fong Yue Ting* v. *U. S.*, 149 U. S., 698, quoted by lower court. (R., 33.) Equally may a treaty supersede a prior treaty. If validity does not include continued or present existence, we should have one circuit court of appeals holding a given treaty was presently existing and another holding it was not. The appellate jurisdiction of the court is aimed at speedily securing uniformity of rule on all such matters throughout all Federal territory. In view of the foregoing, it

would not be profitable to follow counsel through their labored analysis (their brief, 19–24) of cases cited by this court in the *Champion Lumber Co. Case* (227 U. S., 451).

Construction or application of Constitution as between the police power of the State and the full control of Congress over Indian affairs.—Here the lower court stated its view of what was drawn in question, as follows (R., 38):

> The question is where is the *power to regulate?* etc. (For full quotation see p. 23, our original brief).

A reference to the *Heff case* (197 U. S., 488, 505, 506), here cited by the court below, shows the court was speaking of constitutional powers.

See also *Dick* v. *U. S.*, 208 U. S., 353

Construction of treaty of 1865, 1867.—The fact that the court's opinion was pronounced on the original demurrer becomes of no importance in view of the concession of the counsel (their brief, p. 16) that this court has jurisdiction, if a jurisdictional question appears from the record, though not passed on by the court below. This also disposes of the suggestion in the first paragraph, page 28, of their brief. As to the second paragraph (p. 28) we grant that the references in the pleadings are mere conclusions of law. They show, however, that the pleader deemed these questions of law were involved; and even invited them, by going so far as to improperly plead legal contentions.

On page 34 of their brief, counsel, when arguing the merits, say:

> We do maintain that a treaty * * * can *modify* or repeal a prior treaty between the same parties.

They thereby indicate a belief that the construction of these later treaties is *still* "drawn in question."

MERITS.

I. Effect of Enabling Act on Article VII.

Respondents say (their brief, 29) it operated to repeal the article because by silence it shows a purpose not to exercise that reserved power in Minnesota after admission. This feature is covered by our original brief. It may be noted that since the opinion of the court below in this case, (at which time the latest case brought to its attention was the Sutton case, 215 U. S., 291) a number of cases have been decided bearing upon the force of the general language of the equal admission clause. These cases are referred to in our original brief. It should be noted that the case of *United States* v. *Donnelly*, 228 U. S., *243, 271*, involved the enabling act of California, in terms like that of Minnesota; and of course the *"43 Gallons" case*, 93 U. S., *188*, involved the very same enabling act; and the decision of this court in the *Dick case*, 208 U. S., 355, stating the contention in the *"43 Gallons" case*, shows that the same point was urged and overruled in the later case.

Respondent also insists that the second clause of Article VII was neither "natural" nor "normal,"

and, therefore, unreasonable, because it applied prohibition to 13,000,000 acres. Why argue to this effect when the very same prohibition existed in the same area the day before the treaty by force of the reservation, and had so existed for years? The treaty itself was a declaration both by the Indians and Congress that the continuance of the prohibition was then natural, normal, and necessary, though it recognized that in future it might become otherwise, and gave Congress power to change it as conditions might demand. The very quotation of counsel (their brief, 31) from *Bates* v. *Clark* recognizes the propriety of such a prohibition. Speaking of this quotation in the *Dick case*, 208 U. S., 358, this court said:

> "But it took care to add the qualifying words —" (then follows the last clause of their quotation from the Bates case).

Counsel challenge the Government to cite an instance where so large an area was made artificial Indian country at the incoming of any State. The qualification of the word "artificial" relieves them of many instances of greater dry territory in actual reservation form. It would not be profitable to attempt comparisons in view of the difference in the period of admission, the extent of local development, the number of Indians and the extent of reservations from time to time in different States. We content ourselves with instancing the *"43 Gallons"* case where the condition was more extreme—immediately adjoining the ceded strip here in question.

The area ceded by the treaty of 1863, there involved, was approximately 4,000,000 acres. The report of the Indian Commissioner for 1912 (p. 87) shows that there were 1,436 Indians of the Red Lake and Pembina bands who made the treaty of 1863, against 7,473 Indians in the case at bar. Assuming this proportion was constant and existed at the time of the treaties and reducing the acreage at bar to the proportion demanded on the basis of the *"43 Gallons"* case, it would represent a little over 2½ million acres against 4 million in that case; or increasing the *"43 Gallons"* case acreage in the same proportion, there was protection there in area corresponding to what it would be if 20 million acres were set aside here.

The language of Article VII of the treaty in the *"43 Gallons"* case was similar, as the court below here said (R., p. 25) to that of the second clause of the article in the case at bar. And this court said of it:

> This stipulation was not only *reasonable* in itself, but was justly due from a strong government to a weak people it has engaged to protect.

II. The effect of the later treaties.

Respondents insist (their brief 33–34) that we misconceive their contention, and then advance a contention nowhere disclosed in the record. It would be strange if we had anticipated it. They insist that the first clause of the Article VII is limited to the reservations created by Article II of the treaty of 1855. (This we agree to.) They then insist that

the second clause of Article VII does not cover all the land within the ceded boundaries prescribed by Article I, but only so much within those boundaries as remains after excluding the tracts set apart by Article II. This we dispute.

The question presented involves the construction of the words "shall *continue* and be in force *within the entire boundaries of the country herein ceded,*" in the second clause of Article VII. The boundaries of the country ceded enclose a single entire tract; and the language of Article I is "*cede*, sell, and convey * * * all our right, title, and interest in and to *the lands* * * * *included within the following boundaries.*" (These boundaries correspond with the red lines on each map.)

Article II reads:

> There shall be, and hereby is, reserved and set apart a sufficient quantity of lands for the permanent homes of said Indians, the lands so reserved and set apart to be in separate tracts as follows [then are described seven different tracts for the Mississippi Band, the first of which is entirely *outside* the ceded boundaries and is *not shown* on respondent's map].

We submit:

(1) This contention is purely academic. Bemidji is not located within any of the tracts set apart by the treaty of 1855; so that whichever meaning be given the second clause of Article VII it reaches out to that town. Thus the argument must proceed as in our original brief (pp. 40–44), which answers

the contention of the pleader who drafted the bill of complaint (for record references see our original brief, p. 25). This argument respondents do not attempt to meet in the brief here filed.

(2) That as Article VII contrasts "reservations" in the first clause against "entire boundaries of the ceded country" in the second clause; and, especially as one reservation lay outside of the ceded boundaries, they were purposely contrasted: (*a*) to make the "trade" and "intercourse" laws reach the outside or "Mille Lac" tract; (*b*) to make these laws generally endure only so long as the reservations endured; and (*c*), as to the liquor laws, to apply them to the *whole* bounded area without regard to whether it should thereafter be reservation or not, in order to protect the solid block against interior storehouses for liquor. The "Mille Lac" piece, being well outside, did not need the protection when it ceased to be a reservation.

(3) Respondent would interpret the clause as if it read "within the entire boundaries of the country herein ceded (excepting the six tracts reserved for homes within the ceded boundaries)." There is no justification for inserting such additional language in the act. To do so would destroy its usefulness as is apparent from the consequences developed from this contention by counsel themselves (their brief, 41, foot). It would lessen the ultimate protection to the Indians in the very areas made their home, and because 3 separate tracts were given to the Pillager and Lake Winnibigoshish Indians which they might

from time to time independently surrender, it would leave storehouses for liquor within the very boundaries of the new reservation created by the treaty of 1865; and by the surrender then made of the old Mississippi reservations, there would have been left a storehouse for liquor at the very boundary of the new reservation "C" on its eastern side, and another but fifteen miles away.

(4) Article I of the treaty of 1863 (the "*43 Gallons*" case) corresponds in its language to Article I of the treaty of 1855, with like single entire outer boundaries. There were no tracts reserved within the ceded area. The language of Article VII in the treaty of 1863 is "throughout the country hereby ceded." Manifestly, the language "hereby ceded" as there used must relate only to the tract bounded in Article I. The same rule should here obtain, we insist, even if the same general language had been used in Article VII of each treaty. But out of abundant caution, because some tracts within the outer boundaries were being set apart, the framers of the treaty used the words "*continue and be in force within* the *entire boundaries*" in addition to the words "of the country hereby ceded."

(5) Article I uses the word "*cede,*" and then in identifying what is ceded describes a *single entire tract* by entire outer boundaries only. This should determine the matter. Also the word "continue" carries the idea that the prohibition should remain as it before was within the entire boundaries i. e. total—not spotted prohibition.

Counsel insist (their brief, 38–39) that by the treaty of 1865 the separate tracts then receded to the United States (within "A" of our map, or "357" of theirs) became by such recession "wet" territory. This is a mere consequence of their contention that the second clause of Article VII did not apply to the tracts set apart by Article II of the treaty of 1855. We have pointed out that it would leave a storehouse for liquor abutting the very boundary of the newly created reservation "C" and would leave from one to three potential storehouses inside the new reservation "C" itself. (Tracts 358, 359 of their map, and 360, not shown on their map.) It would also leave the "507" which is a part of the cession of 1863 ("43 Gallons" case) "wet" whenever it should be surrendered after 1865 by the Mississippi Band, as such later surrender by their theory would wipe out Article VII of the treaty of 1863 as applied to that area, and would thus leave that part of "507," as a liquor storehouse bordering on the last reservation (their map 509) created by the treaty of 1867. The general result would be that inside and to the north of the Leech Lake Reservation (with its five thousand odd Indians) you would have storehouses for liquor and many storehouses elsewhere in perilous proximity to the other reservations. On the other hand as the Government interprets the second clause of the treaty of 1855, all would have been "dry" territory continuously, and the enforcement of the treaty would have protected the Indians as needed. No better illustration of the error in interpreting the sec-

ond clause of Article VII as counsel would interpret it can be found than the very results disclosed by them in their brief (p. 41). The first four conditions recited would be possible only under their interpretation; and the fifth, the wet strip around Red Lake, never was protected at any time by any treaty.

Counsel list these conditions to indicate that we are giving the court a false impression as to the protective influence of Article VII, and possibly to show the unreasonableness of continuing it in force. We insist that Article VII, as we interpret the second clause, is protective; and if it is not under their interpretation such interpretation should not be adopted. This court, in *Lau Ow Bew* v. *U. S.*, 149 U. S., 59, said:

> Nothing is better settled than that statutes should receive a sensible construction such as will effectuate the legislative intention and if possible, so as to avoid an injust or absurd construction. (*United States* v. *Gue Lin*, 176 U. S., 467.)

At this point because counsel insist that the last-named Red Lake wet-strip makes it idle to enforce Article VII, it will be noticed that the same strip, in practically the same depth, lay between the tract ceded by the treaty of 1863 and the Red Lake Reservation, to which the Pilliger and Pembinas then moved (see our map). None the less, this court in the *"43 Gallons"* case upheld the treaty provision.

III. The effect of act of January 14, 1889 (25 Stat., 642), and subsequent change of conditions.

Counsel next insist (their brief 39) that by the act of 1889, *supra* (25 Stat., 642), all Indian titles were extinguished. Later (p. 44) they state the true situation in this regard, viz, that lands of the Red Lake and White Earth Reservations, not required for allotments by the terms of the act, remained tribal lands (unaffected thereby). Then they insist (39–40) that by this act of 1889 and subsequent alleged deeds thereunder, in 1890, the Pilliger and Lake Winnibigoshish tracts (Nos. 358 and 359 on their map) became wet. This is, in turn, a result of their contention as to the force of the second clause of Article VII. (It may be noted that documents of the Indian Bureau show these reservations as in existence and enlarged by Executive order as late as 1897, and possibly since.) On page 37 of their brief counsel say that there could have been no purpose in also providing that the liquor laws, themselves a part of the general trade and intercourse laws, should be in force on the same reservations, suggesting that the matter was already covered by the first clause. But their very contention shows that the first clause is operative only so long as the reservations endure, while the second clause would protect the lands regardless of their status as reservations or otherwise.

They then suggest (their brief, 42) that the amendment of January 30, 1897 (29 Stat., 506), the general liquor prohibition law, shows that "such an amendment was necessary." We agree. But we say that

the amendment was a general law and would operate in many cases where there was no treaty provision continuing the prohibition, to prevent the allotments from becoming spotted storehouses for liquor. They assert (p. 44, their brief) that the question of the present existence of tribal lands is the large test. We say that it is but one of the tests and a minor one, the essential being the personal need of the Indian wards. They admit that wardship still obtains (their brief, pp. 43). This court in the *Perrin* case shows that from the standpoint of the need of the Indian three features, at least, should be considered. It says:

> The trust period has not expired, the tribal relation has not been dissolved, and the wardship of the Indians has not been terminated. *United States* v. *Perrin*, 232 U. S., 487.

Each feature is presented in the case at bar. Respondent also admits that tribal title still endures to those portions of the White Earth and Red Lake Reservations, excepted from the operation of the act of 1889; and nearly 40,000 acres in the former reservation remained unallotted at the time of the acts here complained of. (Report of Commissioner of Indian Affairs, 1912, p. 102.) They still have and draw their tribal moneys, therefore tribal relation must continue.

As our map shows Bemidji is closer to the Red Lake, Leech Lake, and White Earth Reservations than is Crookston to any of the three, or to any reservation, and there is no part of the ceded area of 1855 that

is not to-day nearer one of these three reservations than were the extreme portions of area "D" (ceded under the treaty of 1863) to the Red Lake and White Earth Reservations, and yet that whole area was held a reasonable and necessary protection in 1876 in the *"43 Gallons"* case.

If the increased number and appetites of the whites are to be the test, apparently the need for wet territory is great. But the whites came into this territory with the knowledge that the Indian needs were paramount; and that it could be kept dry whenever, and so long as, the interests of the Indians required. They have gained and enjoyed greater privileges by the voluntary Indian cessions; and may not use them to built up equities in themselves against the need of protection to the Indians. Viewed from any angle affecting the Indians, the need for protection would seem to be as great as it was in 1876 when the *"43 Gallons"* case was decided. And at least, it can not be said that Congress acted arbitrarily in 1911, in refusing to adopt President Taft's recommendation as to diminishing the dry area in the cession of 1855. The various features of the need for protection, as it existed at the time of the acts complained of are treated of in the original brief.

Counsel (their brief, p. 35) criticises our reference to the condition of the Indians as disclosed by the 1912 report of the Indian Commissioner, because the facts there detailed are not in the record in this case. We viewed it as a report of an executive department of the Government which this court would judicially

notice, and refer the court to a recent case in which it has so noticed and used such reports (*Donnelly* v. *United States*, 228 U. S., 256–257).

CONCLUSION.

This case involves the enforcement of Article VII of the treaty only as to the town of Bemidji. No question here arises as to its enforcement in any other portion of the ceded area. We submit that the showing here made does not demand or warrant a judicial declaration that the need for protection at this point, midway between the three reservations, is so lacking as that the attempted enforcement of the article there by the Department of the Interior was an arbitrary act. Rather should it be said that the question, as applied to Bemidji is still a legislative one and the showing here made should have been submitted by respondents to Congress for its discretionary action, under the last clause of Article VII.

WM. WALLACE, JR.,
Assistant Attorney General.

APRIL, 1914.

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